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without inspecting it, that constituted acceptance, and verdict should be for plaintiff, unless plaintiff, with knowledge, instructed defendant to dispose of the lumber to its account, held erroneous as assuming that defendant delivered lumber to its vendee and because ignoring the contract specifications.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 718.]

8. Sales (§ 181 (1)*)—Burden of Proof.—While a seller of lumber which had waived its right to insist on the buyer's acceptance may retract the waiver where it was made in ignorance of all the facts and may recover upon proof that the lumber was substantially of the character specified, yet the seller has the burden of showing that the lumber was of the character specified, and the mere failure of buyer to have the same inspected will not relieve it of that burden.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 17.]

Appeal from Corporation Court of Newport News.

Action by the Paxton Lumber Company against the Rosenbaum Hardware Company. There was a judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

Wm. A. Graff, of Norfolk, and *J. Winston Read*, of Newport News, for plaintiff in error.

Baird & Swink, of Norfolk, for defendant in error.

SWIFT & CO., Inc. v. HATTON.

Jan. 16, 1919.

[97 S. E. 788.]

1. Master and Servant (§ 103 (1)*)—Safe Place of Work—Nature of Duty.—A master is under an absolute obligation, that is, charged with a nonassignable duty to use due care in providing and maintaining a reasonably safe place for his servants to work.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 669.]

2. Master and Servant (§ 164*)—Safe Place of Work—Duty of Master—Supervision.—Although instrumentalities are in themselves safe if properly placed and used, yet, as delinquencies of coservants may render the place of work unsafe, it is the unassignable duty of the master to exercise reasonable care by supervision to keep himself informed as to the manner in which the duties intrusted to the coservants are performed.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 669, 683.]

3. Master and Servant (§ 164*)—Safe Place of Work—Duty of Master—Supervision.—A master is not bound to supervise the merely

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executive details of the work to be done by his servants during the very progress of the work.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 690.]

4. Master and Servant (§ 107 (4)*)—Safe Place of Work—Duty of Master—Transitory Perils.—A master is not bound to protect a servant from transitory perils due to no fault of plan or construction, or lack of repair, and to no permanent want of safety in the works or in the manner in which they have ordinarily been used.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 689, 690.]

5. Master and Servant (§ 107 (5)*)—Safe Place of Work—Shifting Conditions.—A master is not bound to protect his servant from dangers caused by frequent changes in the progress of the work.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 689.]

6. Master and Servant (§ 107 (3)*)—Safe Place of Work—Work of Preparation.—A master is not bound to protect a servant from dangers due to the preparation or care of an instrumentality, where such preparation and care of the instrumentality are part of the work which the injured servant or his fellow servant undertook to do.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 693.]

7. Master and Servant (§ 185 (7)*)—Fellow Servants—Safe Place of Work.—A master is not liable where a delinquent fellow servant has handled or placed a safe instrumentality so carelessly as to convert it for the time being into a dangerous agency.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 699.]

8. Master and Servant (§§ 101, 102 (10)*)—Injuries to Servant—Dangers Known to Servant.—Duty of supervision and superintendence does not exist where the danger is known to the injured servant or is so open and obvious that he is presumed to have had knowledge of it.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 694-7.]

9. Master and Servant (§ 217 (29)*)—Assumption of Risk—Negligence of Fellow Servants.—Where an abnormal condition may reasonably be anticipated by an injured servant to exist without the knowledge of the master, he assumes the risk during such time of the negligence of his coservants in the discharge of their duties.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 669.]

10. Master and Servant (§ 96 (1)*)—Place for Work—Cause of Defects.—Where an abnormal condition causing injury is not merely temporary and has continued for such a length of time that the master has actual or constructive knowledge of it, he is liable, regardless of the cause of the condition.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 680, 683.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

11. Master and Servant (§ 124 (1)*)—Duty of Master—Inspection of Instrumentalities.—The duty of inspection of a safe instrumentality, which might be used by coservants in such a manner as to endanger others, exists under the same circumstances as the duty of supervision and superintendence.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 683.]

12. Trial (§ 1001 (1)*)—Verdict—Effect.—Where there is ample evidence to sustain a finding of the jury, that question is concluded by the verdict.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620; 17 Va.-W. Va. Enc. Dig. 69.]

13. Master and Servant (§ 278 (3)*)—Injuries to Servant—Evidence—Sufficiency.—In an action by a salesman of a packing company who was injured by a fall due to the overturning of a pork barrel on which he stepped in the discharge of his duty, in accordance with a long-established custom with respect to the storeroom, evidence held to warrant a finding that the foreman in charge of the room was negligent in failing to ascertain the position of the barrel and to discharge his duty to put it in a safe position or to replace it if it had been moved.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 725.]

14. Appeal and Error (§§ 215 (1), 719 (7)*)—Review—Instructions.—Error in an instruction, not assigned in the appellate court and not raised below, cannot be considered.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 563.]

15. Master and Servant (§ 235 (4)*)—Contributory Negligence—Inspection.—The servant is under no duty to discover latent dangers and may rely on the assumption that the master has exercised care.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 680, 698.]

16. Master and Servant (§ 208 (1)*)—Injuries to Servant—Assumption of Risk.—In an action by a salesman of a packing company who, in the performance of his duties in attempting to locate boxes of glycerine, stepped on a pork barrel which, being insecurely placed on the rack on which barrels were stacked, tipped over, causing the salesman to fall, held, that he did not assume the risk of injury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 692.]

17. Master and Servant (§ 233 (5)*)—Contributory Negligence—Customary Acts.—Where a salesman of a packing company, in the performance of his duties and following the usual custom, stepped on a pork barrel, which tipped, causing him to fall, held, that recovery could not be denied on the ground that, as he might have

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ascertained from the foreman the position of the goods which he was attempting to locate, the salesman adopted a dangerous method.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 714.]

Error to Circuit Court of City of Norfolk.

Action by Thomas B. Hatton against Swift & Co., Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Hughes, Little & Seawell, of Norfolk, for plaintiff in error.

Loyall, Taylor & White and *W. H. Venable*, all of Norfolk, for defendant in error.

MURPHY'S HOTEL, Inc. v. CUDDY'S ADM'R.

Jan. 16, 1919.

[97 S. E. 794.]

1. Carriers (§ 280 (4)*)—Passenger Elevator—"Common Carrier."

—One maintaining a passenger elevator in a hotel or other public building is a "common carrier," and required to exercise the highest degree of care in maintenance and operation of the elevator to prevent injury to passengers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier. For other cases, see 2 Va.-W. Va. Enc. Dig. 701.]

2. Carriers (§ 316 (7)*)—Passenger Elevators—Injury—Presumption.—If injury to passenger is caused by apparatus wholly under control of carrier, and furnished and applied by it, as an elevator, and the accident is such as does not ordinarily occur, if due care is used, there is a presumption of carrier's negligence, which does not, however, arise from mere fact of accident.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 705.]

3. Witnesses (§ 276*)—Calling of Employee as Adverse Witness.—In action against hotel company for death of guest, caught between floor and elevator, court properly permitted operator of elevator to be called by plaintiff as adverse witness, and examined according to rules applicable to examination and contradiction of such a witness, under Code 1904, § 3351; operator having been adverse or hostile, though without adverse interest.

4. Carriers (§ 315 (1)*)—Injury to Elevator Passenger—Evidence—Support by Pleadings.—In action against hotel company for death in elevator accident, declaration alleging that defendant negligently, recklessly, etc., employed person to operate elevator who was in-

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